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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH ARMAND GRAJEDA,

Defendant and Appellant.

B212976

(Los Angeles County
Super. Ct. No. LA056387)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Martin Larry Herscovitz, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General,
Kenneth C. Byrne and Jason Tran, Deputy Attorneys General, for Plaintiff and
Respondent.

Defendant Kenneth Armand Grajeda contends on appeal that statutory provisions and conditions of probation requiring him to register as a sexual offender and imposing restrictions on where he may reside and travel constitute cruel and unusual punishment under the federal and state constitutions. With respect to the registration requirement, we are bound by state and federal precedent to uphold it. With respect to the court-imposed probationary conditions, defendant's failure to object at the sentencing hearing forfeited any issues pertaining to them. With respect to the statutorily prescribed residency restrictions, we conclude the factual record is insufficiently developed to permit resolution of the issue.

FACTUAL AND PROCEDURAL BACKGROUND

A. Information

Defendant was charged in a one-count information with a felony violation of Penal Code section 288.3, meeting a minor for lewd purposes.¹ The information alleged that defendant arranged a meeting with a law enforcement official who he believed was a minor named "Megan." The information provided notice that conviction of the offense would require defendant to register pursuant to section 290.

B. Evidence at Trial

The prosecution established that in July 2007, FBI agent Mark Botello went on the internet posing as a 13-year old girl named "Megan." In his profile, agent Botello indicated he was in the 8th grade and lived in Southern California.

¹ Unless otherwise designated, statutory references are to the Penal Code.

Defendant, who was in his 20's, began a dialogue with "Megan." In this dialogue, defendant asked questions about where she lived, whom she lived with, whether her mother worked, and whether she had friends in the apartment complex. Defendant did not discuss sex explicitly, but said that he wanted to meet "Megan" and do "playful stuff" that "tickles" with his "tongue and hands and lips," and that he would make her "feel fantastic." FBI agent Adrienne Mitchell had telephone conversations with defendant during which she played the part of "Megan" and directed defendant to her location. On July 26, defendant found his way to the designated location, where he was arrested by law enforcement officials. Inside defendant's car, officers found a travel bag containing a shot glass, a bottle of rum, a can of coca cola, two condoms, candy and a bottle of body spray.

Testifying on his own behalf, defendant stated that he thought "Megan" was over 18 despite her assertions to the contrary because her screen name was "MsMegan818" and because she indicated knowledge about sexual matters.²

C. Verdict and Sentencing

Defendant was found guilty. Imposition of sentence was suspended and he was placed on five years probation. As one of the conditions of probation, the court ordered defendant not to "reside near, visit, or be within 100 yards of places minors frequent or congregate, including, but not limited to schoolyards, parks, amusement parks, concerts[,] theaters, playgrounds, beaches, swimming pools and arcades unless approved by the probation officer and supervised by an approved chaperone." Other conditions prohibited defendant from being alone with a minor or residing with a minor unless approved by the probation officer, and from using a

² In one internet dialogue, Agent Botello, posing as "Megan," had discussed having a friend who engaged in oral sex with her boyfriend.

computer or any form of internet service without the approval of the probation officer. Defendant was required to register as a sex offender under section 290.

DISCUSSION

Both the Eighth Amendment restriction on cruel and unusual punishment contained in the United States Constitution and the California constitutional prohibition on cruel or unusual punishment (Cal. Const., art. I, § 17) forbid punishment that is grossly disproportionate to the crime committed. (*Ewing v. California* (2003) 538 U.S. 11, 23; *In re Lynch* (1972) 8 Cal.3d 410, 424; *People v. Norman* (2003) 109 Cal.App.4th 221.) “A defendant has a considerable burden to overcome when he challenges a penalty as cruel or unusual. The doctrine of separation of powers is firmly entrenched in the law of California and the court should not lightly encroach on matters which are uniquely in the domain of the Legislature.” (*People v. Johnson* (2010) 183 Cal.App.4th 253, 296.) In his brief on appeal, defendant raises under a single heading three distinct issues: (1) whether mandatory registration constitutes cruel and unusual punishment; (2) whether the probation conditions imposed on him by the court constitute cruel and unusual punishment; and (3) whether the residency restrictions imposed by section 3003.5 constitute cruel and unusual punishment. We address each of those issues separately.

A. Mandatory Registration

Both our Supreme Court and the United States Supreme Court have specifically held that sex offender registration statutes do not impose “punishment.” In *People v. Castellanos* (1999) 21 Cal.4th 785, the California Supreme Court explained that the sex offender registration requirement was intended to “serve[] an important and proper remedial purpose,” as opposed to a

punitive purpose: “‘promot[ing] the “state interest in controlling crime and preventing recidivism in sex offenders.’”” (21 Cal.4th at p. 796, quoting *Wright v. Superior Court* (1997) 15 Cal.4th 521, 527.) Moreover, the court found that the sex offender registration requirement is not “so punitive in fact that it must be regarded as punishment despite the Legislature’s contrary intent” because “[a]lthough registration imposes a substantial burden on the convicted offender, this burden is no more onerous than necessary to achieve the purpose of the statute.” (*People v. Castellanos, supra*, 21 Cal.4th at p. 796.) In *Smith v. Doe* (2003) 538 U.S. 84, the United States Supreme Court, reviewing the Alaska Sex Offender Registration Act, similarly held that the Act was a civil regulatory scheme, nonpunitive in intent or effect.

Both *People v. Castellanos* and *Smith v. Doe* addressed the validity of mandatory registration under the ex post facto clauses of the federal and state constitutions (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9). Subsequently, our Supreme Court considered the validity of mandatory registration under the cruel or unusual punishment clause of the California Constitution (Cal. Const., art. I, § 17). In *In re Alva* (2004) 33 Cal.4th 254, the court held that mandatory lifetime sex offender registration did not constitute punishment for purposes of the prohibition on cruel or unusual punishment. (*Id.* at p. 292.) With respect to whether mandatory sex offender registration constitutes cruel and unusual punishment, we are bound by the clear precedent of our highest court and the United States Supreme Court.³

³ Defendant contends that “registration requirements have . . . been radically expanded” since *In re Alva*, and that the constitutionality of these new requirements is an open question. In November 2006, voters enacted Proposition 83, “The Sexual Predator Punishment and Control Act,” subtitled “Jessica’s Law,” “a wide-ranging initiative intended to ‘help Californians better protect themselves, their children, and their communities’ [citation] from problems posed by sex offenders by ‘strengthen[ing] and (Fn. continued on next page.)

B. Probation Conditions

In the trial court, defendant expressly accepted the conditions of probation and neither objected nor sought clarification of them. Nevertheless, on appeal, he contends the conditions restricting where he may live and travel constitute cruel and unusual punishment.

A sentencing court “has broad discretion to determine whether an eligible defendant is suitable for probation and, if so, under what conditions.” (*People v. Olguin* (2008) 45 Cal.4th 375, 379, quoting *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) “[T]he Legislature has empowered the court, in making a probation determination, to impose any ‘reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer’” (*People v. Olguin, supra*, at p. 379, quoting § 1203.1, subd. (j).) “If a defendant believes the conditions of probation are more onerous than the potential sentence, he or she may refuse probation and choose to serve the sentence. [Citations.] Additionally, at the sentencing hearing, a defendant can seek clarification or modification of a condition of probation.” (*People v. Olguin, supra*, at p. 379.)

“A defendant’s failure to object at sentencing to an unreasonable probation condition waives the claim of error on appeal unless the issue involves a pure question of law.” (*People v. Jungers* (2005) 127 Cal.App.4th 698, 702, citing

improv[ing] the laws that punish and control sexual offenders’ [citation].” (*In re E.J.* (2010) 47 Cal.4th 1258, 1263.) However, the only provision of Proposition 83 identified by defendant as having an impact on him is the provision prohibiting sexual offenders from residing within a certain distance of places likely to be frequented by minors. We address that provision separately below.

People v. Welch (1993) 5 Cal.4th 228, 230, 234-236; see *In re Sheena K.* (2007) 40 Cal.4th 875, 886-887.) “A defendant who contends a condition of probation is constitutionally flawed still has an obligation to object to the condition on that basis in the trial court in order to preserve the claim on appeal.” (*People v. Gardineer* (2000) 79 Cal.App.4th 148, 151; accord, *In re Josue S.* (1999) 72 Cal.App.4th 168, 171 [“The conditions of probation imposed were not the basis of an objection in the juvenile court and thus any contentions concerning their constitutional inappropriateness are the subject of waiver or forfeiture.”].) “A timely objection allows the [sentencing] court to modify or delete an allegedly unreasonable condition or to explain why it is necessary in the particular case. . . . A rule foreclosing appellate review of claims not timely raised in this manner helps discourage the imposition of invalid probation conditions and reduce the number of costly appeals brought on that basis.” (*People v. Jungers, supra*, at p. 702, quoting *People v. Welch, supra* at p. 235.) Defendant’s failure to object to the specific probation conditions imposed by the trial court constitutes a forfeiture of any issue pertaining to their reasonableness on appeal.

In his reply brief, defendant contends that no “functional purpose” would have been served by objecting because the restrictions were “dictated by Proposition 83.” In fact, there was no discussion of Proposition 83 or section 3003.5 (the statutory provision restricting residency of sexual offenders, discussed further below) at the sentencing hearing. The conditions imposed by the court go beyond statutory requirements and appear geared toward defendant’s particular situation.⁴ Accordingly, we are not persuaded that objection to the probation conditions at the time they were imposed would have been futile.

⁴ Because there is no indication that the probationary condition related to residency was intended to correlate to the residency restrictions of Proposition 83, we decline
(*Fn. continued on next page.*)

C. Statutory Residency Restrictions

Defendant challenges on cruel and unusual punishment grounds section 3003.5, subdivision (b), which provides that “it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather.”⁵

As respondent points out, the issue of the excessiveness of the punishment imposed must often be resolved on a case-by-case basis by examining the specific facts of the defendant’s situation. (See *People v. Dillon* (1983) 34 Cal.3d 441, 479-489; *People v. Johnson*, *supra*, 183 Cal.App.4th at p. 296; *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8.) Therefore, if a defendant fails to raise the issue of cruel and unusual punishment in the trial court, he or she risks forfeiting the issue. (*People v. Norman*, *supra*, 109 Cal.App.4th at p. 229; *People v. Em* (2009) 171 Cal.App.4th 964, 971, fn. 5.) The soundness of this rule is apparent when we consider the analysis that must take place before a punishment may be declared cruel and unusual. As a preliminary matter, courts must address whether the sanction or statutory provision at issue constitutes “punishment.” The applicable test was set forth in *Smith v. Doe*, where the United States Supreme Court stated that where the legislative intention was to enact a regulatory scheme rather than impose a punishment, courts must “examine whether the statutory scheme is “so punitive either in purpose or effect as to negate [the State’s] intention” to deem it “civil,”” generally by focusing on the following factors: “whether, in its necessary operation, the regulatory scheme has been regarded in

respondent’s suggestion that we modify the language of the conditions to impose a 2000-foot restriction rather than a 100-yard restriction.

⁵ Section 290 requires a person convicted of a violation of section 288.3 to register as a sex offender. The parties do not dispute that defendant qualifies.

our history and tradition as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.” (*Smith v. Doe*, *supra*, 538 U.S. at pp. 92, 97.)

Once the punitive nature of the provision or sanction is established, courts must then analyze whether the particular punishment imposed was grossly disproportionate to the offense, by reviewing “the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society”; “compar[ing] the challenged punishment with punishments prescribed for more serious crimes in our jurisdiction”; and “compar[ing] the challenged punishment to punishments for the same offense in other jurisdictions.” (*People v. Johnson*, *supra*, 183 Cal.App.4th at pp. 296-297.) “The importance of each of these prongs depends upon the facts of each specific case.” (*Id.* at p. 297.) A punishment which is not “disproportionate in the abstract” may nevertheless be constitutionally impermissible “if it is disproportionate to the defendant’s individual culpability.” (*People v. Dillon*, *supra*, 34 Cal.3d at p. 480.)

A number of courts have addressed whether their states’ versions of residency restrictions on sexual offenders constitute “punishment” for purposes of the prohibitions on cruel and unusual punishment and/or ex post facto laws. The majority has held that the restrictions do not impose “punishment.” (*State v. Seering* (2005 Iowa) 701 N.W.2d 655, 666-670; *People v. Leroy* (Ill.App.5 Dist. 2005) 357 Ill.App.3d 530, 537-542 [828 N.E.2d 769]; *Weems v. Little Rock Police Dept.* (8th Cir. 2006) 453 F.3d 1010, 1017-1019 [Arkansas law]; *Doe v. Miller* (8th Cir. 2005) 405 F.3d 700, 718-723 [Iowa law]; *Parker v. King* (M.D. Ala. March 31, 2008) 07-CV-624 [2008 U.S. Dist. LEXIS 26226, *8-16 [Alabama law]; *Doe v. Baker* (Ga. 2006) 05-CV-2265 [2006 U.S. Dist. LEXIS 67925, *7-18] [Georgia law]; *Doe v. Parish* (N.D. Ok. 2006) 06-CV-0457 [2006 U.S. Dist. LEXIS 65873,

*43-48] [Oklahoma law]; but see *Com. v. Baker* (Kentucky 2009) 295 S.W.3d 437, 442-447; *State v. Pollard* (2009) 908 N.E.2d 1145, 1149-1154; *Mikaloff v. Walsh* (N.D. Ohio 2007) 06-CV-96 [2007 U.S. Dist. LEXIS 65076, *11-35] [Ohio law]⁶.) In resolving whether the laws in question resulted in punishment, the majority of these courts had before them evidence indicating the impact of the law on the defendant, plaintiff or petitioner pursuing the challenge. For example, in *Doe v. Miller*, the Eighth Circuit had the benefit of a full factual hearing conducted by the district court, including maps of restricted areas and findings indicating the percentage of residential units not in restricted areas. (*Doe v. Miller, supra*, 405 F.3d at p. 706.) In *State v. Seering*, evidence established that the defendant had been provided a map indicating where an offender could live without violating the residency restriction. (701 N.W.2d at p. 660.) In *People v. Leroy*, the record indicated that the defendant had been forced to give up his former residence, but had found a suitable residence in a nearby community. (357 Ill.App.3d at p. 539.) In *Parker v. King*, the court concluded that for purposes of a motion for a preliminary injunction enjoining enforcement of Alabama’s residency restriction, the plaintiff had not established a likelihood of success on the merits concerning the statute’s punitive effect, and left for “another day” whether he could “present evidence and arguments to establish by the clearest proof that the residency and employment restrictions violate the ex post facto clause.” (2008 U.S. Dist. LEXIS 26226, * 15, italics omitted.) In *Doe v. Baker*, the evidence was undisputed that the defendant had found a residence in the county which did not violate the

⁶ The cases in which the courts found that residency restrictions constituted punishment – *Com. v. Baker*, *State v. Pollard*, and *Mikaloff v. Walsh* -- did so in connection with the constitutional prohibition on ex post facto laws. To our knowledge, no court has held that residency restrictions constitute cruel and unusual punishment.

Georgia law's residency restrictions.⁷ (2006 U.S. Dist. LEXIS 67925, *12.) In *Mikaloff v. Walsh*, in which the court found the Ohio law unconstitutional as applied, the plaintiff established that the law would require him to leave the home where he and his family lived rent-free, and that his lack of financial resources rendered him unable to rent another residence. (2007 U.S. Dist. LEXIS 65076, *5-6.)

We believe our Supreme Court has outlined a path which similarly requires an evidentiary showing and evaluation of a defendant's specific circumstances in order to properly address the constitutionality of California's sexual offender residency restrictions. In *In re E.J.*, *supra*, 47 Cal.4th 1258, the Supreme Court addressed the retroactivity of the residency restrictions contained in Proposition 83, and held that imposition of the restrictions on parolees released after the November 2006 date of its enactment did not constitute impermissible retroactive application of a criminal statute or violate the ex post facto clauses of the United States and California Constitutions.⁸ The parolees/petitioners had also challenged the provision on a number of other constitutional grounds, contending it was overbroad and vague, and infringed on privacy rights, property rights, the right to intrastate travel, and the right to substantive due process. The court found these claims presented "considerably more complex 'as applied' challenges to the enforcement of the new residency restrictions as parole violations in the particular

⁷ In *Doe v. Baker*, the court found the law constitutional, but noted that "[a] more restrictive act that would in effect make it impossible for a registered sex offender to live in the community would in all likelihood constitute banishment which would result in an ex post facto problem if applied retroactively to those convicted prior to its passage." (*Doe v. Baker*, *supra*, [2006 U.S. Dist. LEXIS 67925, *12].)

⁸ The Supreme Court announced its decision in *In re E.J.* while this case was pending. We invited the parties to submit supplemental briefing concerning its impact on the present case. We have read and considered the supplemental briefs.

jurisdictions to which each petitioner has been paroled.” In this regard, the court noted: “Petitioners are not all similarly situated with regard to their paroles. They have been paroled to different cities and counties within the state, and the supply of housing in compliance with section 3003.5(b) available to them during their terms of parole -- a matter critical to deciding the merits of their as-applied constitutional challenges -- is not sufficiently established by those declarations and materials to permit this court to decide the claims.” (47 Cal.4th at p. 1281.) The court concluded that with regard to the petitioners’ remaining constitutional claims, “evidentiary hearings will have to be conducted to establish the relevant facts necessary to decide each such claim.” (*Id.* at p. 1283.) The facts to be determined “would include, but are not necessarily limited to, establishing each petitioner’s current parole status; the precise location of each petitioner’s current residence and its proximity to the nearest ‘public or private school, or park where children regularly gather’ (§ 3003.5(b)); a factual assessment of the compliant housing available to petitioners and similarly situated registered sex offenders in the respective counties and communities to which they have been paroled; an assessment of the way in which the mandatory parole residency restrictions are currently being enforced in each particular jurisdiction; and a complete record of the protocol [California Department of Corrections and Rehabilitation] is currently following to enforce section 3003.5(b) in those respective jurisdictions.” (*Id.* at pp. 1283-1284.) The court further stated that “[t]he trial courts of the counties to which petitioners have been paroled are manifestly in the best position to conduct such hearings and find the relevant facts necessary to decide the claims with regard to each such jurisdiction.” (*Id.* at p. 1283.)

In *In re E.J.*, the court remanded the habeas petitioners’ constitutional challenges to the Court of Appeal with directions that each matter be transferred to the trial court in the county to which each petitioner had been paroled in order to

conduct an evidentiary hearing on each petition. The instant case involves not a habeas petition, but a direct appeal of a sentence following conviction. On the record before us, we find no basis for invalidating the sentence. Accordingly, the conviction and sentence are affirmed, without prejudice to defendant's pursuing additional relief in the trial court by way of a habeas petition. (See *People v. Villa* (2009) 45 Cal.4th 1063, 1069 [habeas relief available to probationer].)

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.